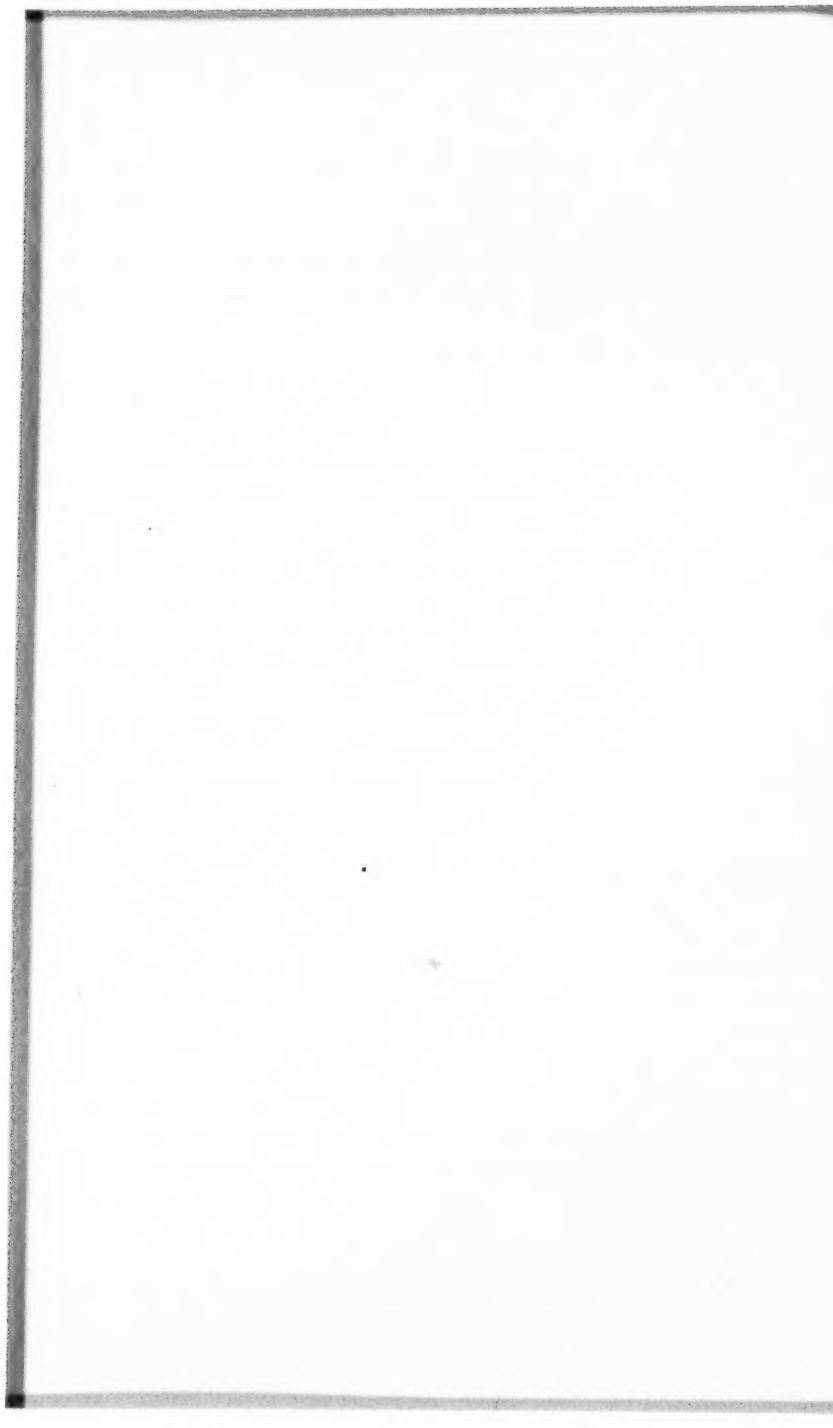

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 972

DAVID O'BRIEN,

Petitioner,

vs.

PABST SALES COMPANY.

SUPPORTING BRIEF.

To the Honorable the Supreme Court of the United States:

I.

Opinions of the Courts Below.

The opinion of the District Court appears in the record, pages 62 to 64; the opinion of the Circuit Court of Appeals is reported at 124 Federal (2d) 167, and appears in the record on page 68.

II.

Jurisdiction.

The opinion of the Circuit Court of Appeals was handed down on December 4, 1941, and the motion for rehearing was overruled January 2, 1942, and the judgment affirming

the decision of the District Court was entered on the same day (R. 76).

Jurisdiction is conferred on the Supreme Court by Section 346, 28 U. S. C. A.

Jurisdiction is invoked on the grounds:

(a) The Circuit Court of Appeals has decided an important question involving the invasion of privacy which has not been, but ought to be, settled by the Supreme Court.

(b) The calendar in question shows clearly an implied endorsement of the product by Petitioner, without his consent. The Honorable Circuit Court of Appeals failed to decide this issue.

(c) In the majority opinion, the Court was in error in holding that no case of invasion of the right of privacy was pleaded or proved.

III.

Statement of the Case.

The facts set forth in the statement contained in the petition are sufficient for the purposes of the brief, and for the purposes of brevity are not repeated here.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in overruling Petitioner's contention that his right of privacy had been invaded to such an extent that he was entitled to compensation therefor.

2. The Circuit Court of Appeals erred in holding that the pleadings and evidence did not permit recovery for invasion of rights or privacy.

3. The majority opinion overruled the contention that there was a question of fact for the jury, especially upon the implied endorsement by the Petitioner of the beer in question.

4. The Circuit Court of Appeals failed to consider the law of forty-one states, as well as Texas, in which distribution of the calendar was made.

5. The Circuit Court of Appeals in the majority opinion overruled Petitioner's contention that he was entitled to compensation for use of his name and picture for commercial purposes.

ARGUMENT.

We believe the dissenting opinion of Mr. Justice Holmes best presents Petitioner's position, and we quote it verbatim:

> "There is no Texas statute of decision directly in point, but I think, under the Texas common law, the appellant is entitled to recover the reasonable value of the use in trade and commerce of his picture for advertisement purposes, to the extent that such use was appropriated by appellee.
>
> "The State of Texas, early in its history,[1] adopted the common law of England, so far as it was not inconsistent with its constitution and laws, and provided that such common law, together with such constitution and laws, should be the rule of decision and continue in force until altered or repealed by the legislature.[2]
>
> "The right of privacy is distinct from the right to use one's name or picture for purposes of commercial advertisement. The latter is a property right that belongs to every one; it may have much or little, or only a nominal, value; but it is a personal right, which may not be violated with impunity.

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[1] Act of January 20, 1840.

[2] Revised Civil Statutes of Texas of 1925, Art. 1; *Grigsby* v. *Reib*, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E; 1 Ann. Cas. 1915C, 1101; *Great S. Life Ins. Co.* v. *Austin*, 112 Tex. 1, 243 S. W. 778.

"The great property rights created by the demands of modern methods of advertising are of comparatively recent origin, and may not have been in existence in January, 1840, but the common law of Texas is subject to growth and adaptation in the land of its adoption, as well as it was in the country of its origin.[3] The capacity of the common law of Texas 'to draw inspiration from every fountain of justice' has not been diminished by time, though a century has passed since its adoption by the legislature of that state.[4]

"No one can doubt that commercial advertisers customarily pay for the right to use the name and likeness of a person who has become famous. The evidence in this case shows that appellant refused an offer by a New York beer company of $400 for an endorsement of its beer, and the appellee apparently recognized that it was necessary to obtain the consent of the various football players, because it required that releases be obtained from them. This admittedly was not done. The fact that appellant made this stipulation with the publishers of the calendars may save it from the infliction of punitive damages, but cannot relieve it from the payment of actual damages measured by the value of the unauthorized use of appellant's picture.

"Texas statutes or decisions (if there were any) might make easier the task before us, but the absence thereof does not relieve us of the duty of finding and declaring the governing law of Texas and the forty other states of the Union in which a tort is alleged to have been committed by appellee in the use of appellant's picture for the purpose of advertising beer. If in any of those forty-one states a tort was committed as alleged, the amount of damages proximately resulting therefrom should have been submitted to the jury.

"The decision of the majority leaves the appellant without remedy for any non-libelous use made of his picture by advertisers of beer, wine, whiskey, patent medicines, or other non-contraband goods, wares, and

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[3] Cf. *Funk* v. *United States*, 290 U. S. 371, 383.

[4] Cf. *Hurtado* v. *California*, 110 U. S. 516, 530.

merchandise. It also places every other famous stage, screen, and athletic star in the same situation.[5] If one is popular and permits publicity to be given to one's talent and accomplishment in any art or sport, commercial advertisers may seize upon such popularity to increase their sales of any lawful article without compensation of any kind for such commercial use of one's name and fame. This is contrary to usage and custom among advertisers in the marts of trade. They are undoubtedly in the habit of buying the right to use one's name or picture to create demand and good will for their merchandise.[6] It is the peculiar excellence of the common law that, by general usage, it is shaped and moulded into new and useful forms.

"Appellant's pleadings allege facts that entitle him to recover for either a violation of his right of property or right of privacy, and because the court does not think he is entitled to recover for the latter does not relieve us of the duty of deciding whether or not any right of property was violated. He alleges that he has never given any person, firm, or corporation any right or permission to use or display his picture in the way it was used, and alleges further that its use by the appellee was in wanton disregard of 'the rights or privacy of this plaintiff.'

"The facts out of which the law of this case arises were alleged in the complaint. It appears therefrom that the appellee committed a tort in misappropriating a valuable property right of appellant. Even if forms

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[5] Sergeant York is a nationally famous person, but no one would argue that his name or picture might be used commercially without his consent. Such an argument would be *reductio ad absurdum*.

[6] Illustrative of the value of the use of one's picture for advertising purposes, Gene Tunney says:

> "While I was training for my second fight with Jack Dempsey I was offered $15,000 to endorse a certain brand of cigarettes. I didn't want to be rude, so, in declining, I merely said I didn't smoke. Next day the advertising man came back with another offer: $12,000 if I would let my picture be used with the statement that 'Stinkies must be good because all my friends smoke them.'" (This offer was also refused.) Reader's Digest for December, 1941, page 23.

of action were not abolished, the appellant might seek damages for the tort or waive the tort and sue upon an implied promise to pay the reasonable value of the right appropriated. Appellant has not sought the wrong relief. He was not required to plead the law (ordinarily it is improper to do so); he was only required to state the ultimate facts upon which he relied for relief. If a litigant pleads the wrong law, it is the court's duty nevertheless to apply the correct law to the facts of the case. This was true even before the new rules, and it is doubly true since their adoption. The plaintiff's attorneys did not err in seeking alternative relief.

"Unless the judgment of the court below is modified so as to dismiss this action without prejudice, there can be no doubt that, if appellant brings another suit, he will be met with a plea of res adjudicata, which will probably be sustained; but, if not sustained, appellant would be put to great and unnecessary expense and court costs merely because of a mistake as to the special character of the legal wrong done him by the appellant. One who sues for damages for a tort does not endorse or condone the wrong, regardless of the form in which he may seek damages therefor.

"Because a peremptory instruction was given to the jury to find for the defendant, I respectfully dissent from the opinion of the majority upholding the judgment of the district court."

While we realize there is a conflict upon the law of recovery concerning the invasion of the right of privacy, yet we believe the weight of authority is in favor of recovery for same and we cite the following cases both for and against petitioner's contention:

States Recognizing Right of Privacy:

California

Melvin v. *Reid*, 112 Calif. App. 285, 297 P. 91 (1931);
Mau v. *Rio Grande*, 28 F. Supp. 845 (N. D. Calif.);
Metter v. *Los Angeles Examiner*, 95 P. (2) 491 (1940).

Georgia

Pavesich v. *New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68;
Bazemore v. *Savannah Hospital*, 155 S. E. 194 (1934, Sup. Ct.).

Kansas

Kunz v. *Allen*, 102 Kans. 883, 172 Pac. 532 (1918) (Motion pictures of plaintiff shopping in defendant's store).

Kentucky

Brents v. *Morgan*, 221 Ky. 765, 299 S. W. 967 (1927), 55 A. L. R. 964 (placarding delinquent debtor);
Foster-Milburn v. *Chinn*, 120 S. W. 364;
Jones v. *Herald Post Co.*, 18 S. W. (2) 972.

Louisiana

Itzkovitch v. *Whitaker*, 39 So. 499 (suit to enjoin placing plaintiff's picture in rogue's gallery).

Massachusetts (Fed. Court)

Corliss et al. v. *E. W. Walker*, (1894) 64 F. 280 (57 F. 434);
Levyeau v. *Clements*, 56 N. E. 735, 50 L. R. A. 397;
Themo v. *New England Newspaper Pub. Co.*, 27 N. E. (2) 753 (1940).

Missouri

Munden v. *Harris*, 134 S. W. 1076 (Ct. of App.)—(plaintiff's picture used by defendant for advertising purposes).

New Jersey

Vanderbilt v. *Mitchell*, 63 Atl. 1107.

New York (by statute)

Civil Rights Law, Secs. 50, 51.

North Carolina

Flake v. *Greensboro News Co.*, 195 S. E. 55.

Pennsylvania

Harlow v. *Buno Co.*, 36 D. & C. 101 (1940) (unauthorized use must be intentional).

South Carolina

Holloman v. *Life Ins. Co. of Virginia*, 7 S. E. (2) 169, Sup. Ct. 1940—dictum.

States Not Recognizing Right of Privacy:

Michigan

Atkinson v. *Doherty & Co.*, 121 Mich. 372, 80 N. W. 285.

Rhode Island

Henry v. *Cherry & Webb*, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991.

Washington

Hillman v. *Starr Publishing Co.*, 117 Pac. 594.

Wisconsin

Judevine v. *Benzies-Montague Fuel & Whse. Co.*, (1936) 269 N. W. 295.

Leading cases also recognize the right of recovery for the use of one's photograph for advertising purposes, and among them being the following:

The case of *Lahiri* v. *Daily Mirror*, 295 N. Y. Supp. at page 388, recognizes:

> "Recovery may be had under the statute if the photograph is published in or is a part of the advertisement or for advertising purposes."

Likewise the same principle is established in the case of *Fisher* v. *Rosenberg*, 23 N. Y. Supp. (2) at pp. 678-9, and this case establishes the fact that the unlawful use of one's picture is prohibited unless "it was in connection with his profession". In that case plaintiff's picture was used with that of Irene Castle in an advertisement concerning the sale of "Miles Shoes". The advertisement did not refer to the name of the plaintiff, although it was the picture of the plaintiff in that case. The court finally concluded with the following significant language:

> "As member of a team of professional dancers for a period of years the publicity attached to the publication of his picture would undoubtedly inure to his benefit, provided it was in connection with his profession. In the instant case, however, it was used 'for the purposes of trade' in shoes, by reason of which he suffered humiliation and distress of mind."

The case of *Flake* v. *Greensboro News Co., supra*, by the Supreme Court of North Carolina, establishes the right of one to recover for the unauthorized use of his photograph for commercial purposes, and we quote paragraph 22 of the opinion, at page 64, as follows:

> "We are of the opinion that the reasoning in the Pavesich case, supra, is sound and establishes the correctness of the conclusion that the unauthorized use of one's photograph in connection with an advertisement or other commercial enterprise gives rise to a cause of action which would entitle the plaintiff, without the allegation and proof of special damages, to a judgment for nominal damages, and to injunctive

relief, if and when the wrong is persisted in by the offending parties.

"One of the accepted and popular methods of advertising in the present day is to procure and publish the indorsement of the article being advertised by some well-known person whose name supposedly will lend force to the advertisement. If it be conceded that the name of a person is a valuable asset in connection with an advertising enterprise, then it must likewise be conceded that his face or features are likewise of value. Neither can be used for such a purpose without the consent of the owner without giving rise to a cause of action."

Conclusion.

Although this is a controversy between private parties, yet it does involve a very important question, and such, in our opinion, as should be settled by the Supreme Court.

Respectfully submitted,

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